IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WP(C) No. 494/2012

IN THE MATTER OF:

JUSTICE K.S. PUTTASWAMY (RETD.) AND ANR ...PETITIONER

Vs.

UNION OF INDIA AND ORS. ...RESPONDENT

BRIEF WRITTEN SUBMISSIONS BY MR. KAPIL SIBAL, SENIOR ADVOCATE ON THE QUESTION OF RIGHT TO PRIVACY

1. The present submissions are being filed for the limited purpose of assisting this Hon'ble Court on the question of whether "the right to Privacy" is a fundamental right under Part III of the Constitution. The instant submissions do not concern the merits of the main matters and the validity of the Aadhar legislation. These submissions address the questions raised in the order dated 18.07.2017, the relevant portion of which reads as under:

> "In our opinion to give a quietus to the kind of controversy raised in this batch of cases, once and for all, it is better that the ratio decidendi of M.P Sharma and Kharak Singh is scrutinised and the jurisprudential correctness of the subsequent decisions of this court where the right to privacy is either asserted or referred be examined and authoritatively decided by a bench of appropriate strength...
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> During the course of the hearing today, it seems that it has become essential for us to determine whether there is any fundamental right of privacy under the Indian Constitution"

2. The instant submissions are broadly divided into two parts:

   i. Part I deals with the legal and practical aspects relating to the right to privacy in today's context; and

   ii. Part II deals with decisions of this Hon'ble Court on the Right to privacy.

PART I

DELINEATING THE RIGHT TO PRIVACY IN TODAY'S CONTEXT

3. At the outset, it may be noted that the challenges confronting both citizens and State today are quintessentially different from those addressed by the Supreme Court in ***M.P. Sharma v. Satish Chandra,*** 1954 SCR 1077 and ***Kharak Singh v. State of U.P.***, (1964) 1 SCR 332. The aforesaid decisions cannot possibly be relevant to appreciate the contours of the right to privacy in the present societal context where advances in technology and communication have transformed the relationship between stakeholders *inter se* and in particular the relationship between the State and its citizens. This Hon'ble Court should, therefore, in the context of changed circumstances address the issue of privacy afresh and ought not to consider the issue of privacy from the prism of an era where issues confronting contemporary society did not exist.

4. The right to privacy as an inalienable natural right is based on the classic premise of the individual's wish to be let alone[1]. However, the contours of the right needs to be understood with changing times. Rapid advances in science and technology pose considerable challenges in delineating the exact contours of the right.

5. Thus, a simplistic definition of the right to privacy as "*to be let alone*" is under-inclusive. Privacy is a right which protects the inner sphere of the individual from interference from State and non-state actors and allows the individual to make autonomous life choices regarding the construction of her identity, not only in seclusion from others but in the personal, familial, and social

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1 Samuel Warren and Louis D. Brandeis, *See* 4 Harvard Law Rev. 193. "What was truly creative in the article was their Insistence that privacy, the right to be let alone-was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests."

"Once a civilization has been made the distinction between the "outer" and the "inner" man, between the life of the soul and the life of the body, between the spiritual and the material, between the sacred and the profane, between rights inherent and inalienable, and rights that are in the power of the government to give and take away, between public and private, between society and solitude, it becomes impossible to avoid the idea of privacy by whatever name it may be called- the idea of a private sphere in which man may become and remain himself."

contexts. Privacy expands or contracts depending on the way the three basic variables of subject-matter, relations, and space present themselves in the context of a concrete case[2].

6. Thus, privacy relates to one's physical being, one's thoughts, and inter-personal relationships, private communications, information, and data which one does not wish to be shared and be put in the public domain.

7. With advances in technology the State in the 21st century is far more powerful than it ever was, and is capable of entering a citizens' house without knocking at his/her door. Evolution of technology has facilitated easy intrusion into the life of individuals by State and non-state actors.

8. To address the issue of the right to privacy, we must be cognizant of the fact that in accessing technology, a citizen willy-nilly shares a lot of his data. This applies to mobile phones, smart phones[3], tablets, smart TVs, taking a ride with app-based cabs, giving information through government mandate to banks, for public distribution networks, etc.

9. The concept of privacy therefore has to be viewed in light of two qualitative relationships: one between the citizen and the State;

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2 Oxford Handbook of Comparative Constitutional Law, Oxford University Press, 1st Ed., 2012 @ p. 974

3 In *Riley v. California*, 134 S.Ct. 2473, the Supreme Court of the United States unanimously held that the warrantless search of the cell phone of an accused was not a reasonable search –

> "One of the most notable distinguishing features of modern cell phones is their immense storage capacity...
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> ...The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labelled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier...
>
> Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception."

the other between citizens and non-state actors[4]. Issues of privacy in respect of both have to be dealt with separately. The first has constitutional implications and the second relates to confidentiality. Thus, the right to privacy has both horizontal and vertical attributes.

10. The State may at times, require access to personal information for public good. In this context, the citizen may be obliged to give access to such information for enhancing citizens' entitlements, access to services, prevention or detection of crime, national security, investigation and prosecution of criminal offences.

11. In respect of data shared with the State on account of a legal mandate or otherwise, the issue of privacy is directly linked with fundamental rights enshrined in the Constitution. If for example, an individual's movements throughout the country are tracked, even though he has a fundamental right to move freely throughout the territory of India, State interference by any means whatsoever including through technology would directly impact the citizen's right to privacy[5]. This is also true if the State

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4 In *United States v. Jones* 132 S.Ct. 945, Justice Sotomayor's concurring opinion, while holding that extended GPS monitoring of a suspect by the law enforcement agencies violated his right to privacy, observed that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" [*Smith v. US 99 S.Ct. 2577/; Couch v. United States 409 US 322 (1973); and United States v. Miller 96 S.Ct. 1619/ 425 US 435 (1976)]*

5 In *Kyllo v. United States* 121 S.Ct. 2038 – The US Supreme Court held that the thermal imaging of the house of a persons suspected of growing marijuana was a violation of his right to privacy –

> "The Katz test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable. See 1 W. LaFave, Search and Seizure § 2.1(d), pp. 393–394 (3d ed.1996); Posner, The Uncertain Protection of Privacy by the Supreme Court, 1979 S.Ct. Rev. 173, 188; Carter, supra, at 97, 119 S.Ct. 469 (SCALIA, J., concurring). But see Rakas, supra, at 143–144, n. 12, 99 S.Ct. 421. While it may be difficult to refine Katz when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," Silverman, 365 U.S., at 512, 81 S.Ct. 679, constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that

through technology accesses conversations of individuals sitting in their homes, in respect of which every individual has a legitimate expectation of privacy. Consequently, the right to privacy is inherent in the right to life and personal liberty enshrined in Article 21 of the Constitution[6].

12. The second aspect relating to the right to privacy in the context of State action relates to data, which is shared either by law or otherwise with the State. Such data is shared for specific purposes. For instance, the data shared for getting a passport is for the specific purpose of exercising the fundamental right of citizens to travel. If any other organ of the State accesses that data and breaches confidentiality between citizens and such authority, that *per-se* would be an invasion of the right to privacy. It is also true of data relating to a person's physical attributes shared with a government hospital. Access to such data by another government agency, to which the citizen has not consented, would also infringe the citizen's right to privacy.

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degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search

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Limiting the prohibition of thermal imaging to "intimate details" would not only be wrong in principle; it would be impractical in application, failing to provide "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment," Oliver v. United States, 466 U.S. 170, 181, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). To begin with, there is no necessary connection between the sophistication of the surveillance equipment and the "intimacy" of the details that it observes—which means that one cannot say (and the police cannot be assured) that use of the relatively crude equipment at issue here will always be lawful. The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider "intimate"; and a much more sophisticated system might detect nothing more intimate than the fact that someone left a closet light on. We could not, in other words, develop a rule approving only that through-the-wall surveillance which identifies objects no smaller than 36 by 36 inches, but would have to develop a jurisprudence specifying which *39 home activities are "intimate" and which are not. And even when (if ever) that jurisprudence were fully developed, no police officer would be able to know in advance whether his through-the-wall surveillance picks up "intimate" details—and thus would be unable to know in advance whether it is constitutional."

6 It is *interesting* that Article 14(1) of the Constitution of the Islamic Republic of Pakistan guarantees the right to privacy as a fundamental right:

"*Inviolability of dignity of man etc.*
(1) The dignity of man and, subject to law, the privacy of home, shall be inviolable;.."

13. It is submitted that though the right to privacy is a fundamental right, the same is not absolute. However, the ability of the State to assume or exercise any power that would impinge upon the right to privacy is limited. Where the State infringes the right to privacy, it should atleast meet the following tests, which limit the discretion of the State[7]:-

    i. The action must be sanctioned by law;

    ii. The proposed action must be necessary in a democratic society for a legitimate aim;

    iii. The extent of such interference must be proportionate to the need for such interference;

    iv. There must be procedural guarantees against abuse of such interference.

14. These are some of the safeguards to protect the privacy of citizens. Whether a person's right to privacy has been infringed by the State will have to be determined in light of limitations on the discretionary exercise of power by the State, as enunciated above. That determination will ultimately depend on the issues that arise in the facts and circumstances of each case.

15. The relationship between citizens and non-State actors qua which data is willingly provided by the citizen for enhancing the citizen's own experience is subject to confidentiality to the extent confidentiality can be maintained. There may be platforms where such confidentiality cannot be maintained. In such cases, where there is a dilution of the right to confidentiality, the citizen should be made aware that when sharing such data, there may be a possibility of it being further shared. Knowledge of suc

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7 As held by the European Court of Human Rights in S. & Marper v. The U Kingdom, Application Nos. 30562/04 and 30566/04, Judgment date December 2008:

> 101. An interference will be considered "necessary in a democra society" for a legitimate aim if it answers a "pressing social need" and particular, if it is proportionate to the legitimate aim pursued and i reasons adduced by the national authorities to justify it are "relevar sufficient". While it is for the national authorities to make the assessment in all these respects, the final evaluation of whet interference is necessary remains subject to review by the C conformity with the requirements of the Convention (see *Cost United Kingdom* [GC], no. 24876/94, § 104, 18 January 2(further references).

possibility would enable an informed exercise of the right to confidentiality by citizens.

16. The right to privacy also enjoins the State to put in place a robust data protection law, that obligates non-state actors to ensure that data shared by citizens is secure and that the breach of any confidentiality would be visited with legal consequences. The principles underlying such data protection law should cover the following amongst others:-

i. That the entity or individual housing confidential information will need to put in place an open and transparent system for management of personal information including putting in place a privacy policy;

ii. Collection of solicited personal information and receipt of unsolicited personal information including giving notice about the collection of information.

iii. How personal information can be used and disclosed (including overseas).

iv. Maintaining the quality of personal information secured.

v. The right of individuals to access and correct their personal information.

17. Instances of statutes that protect privacy in the context of data shared by citizens with non-state actors can be found in different jurisdictions[8].

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8 USA: Financial Modernization Act, 15 U.S.C. s.6801-6809 (1999) – requires financial institutions to have a privacy policy; The Cable Communications Policy Act, 47 U.S.C. s.551 (1984) – regulates cable companies and incorporates specific privacy measures; Videotape Privacy Protection Act, 18 U.S.C. s.2710 (1988) – prohibits video stores disclosure of customer records; Telecommunications Act, 47 U.S.C. s. 609 (1996) – privacy measures to limit marketing by telephone companies.

Canada: Federal statute - The Personal Information Protection and Electronic Documents Act, 2000 governing the private sector; Provincial laws governing private entities particularly in the health sector.

France: Loi Informatique Et Libertes Act Nº 78-17 of 6 January 1978 – regulates processing of personal data by public and private entities to ensure that there is no violation *inter alia* of human rights, privacy or individual or public liberties.

PART II

CASE LAW ANALYSIS OF THE RIGHT TO PRIVACY AS FUNDAMENTAL RIGHT UNDER ARTICLE 21

18. It is respectfully submitted that Right to privacy is a quintessential right flowing out of the bouquet of rights under enshrined under Article 21.

19. The judgements in ***M.P. Sharma v. Satish Chandra***, 1954 SCR 1077 (8 Hon'ble judges) and ***Kharak Singh v. State of U.P.***, (1964) 1 SCR 332 (6 Hon'ble judges) which had made certain observations that right to privacy was not a 'guaranteed right' under Part III were premised on an understanding of Part III as per the law laid down in *A.K. Gopalan*[9].

20. *A.K Gopalan* was specifically overruled in ***R.C. Cooper v UOI***, (1970) 1 SCC 248 (11 Hon'ble judges) and thereafter further clarified to be so in ***Maneka Gandhi Vs UOI***, (1978) 1 SCC 248 (7 Hon'ble judges)

21. Thereafter, consistently for almost four and half decades, this Hon'ble Court has in a catena of judgments held that *A.K Gopalan* is bad law[10]. It is too late in the day to urge that the distinctive rights test of Gopalan ought to be applied.

22. More importantly, once *Gopalan* was held to be bad law by an 11 Judge bench in *R.C. Cooper*, smaller benches of this Hon'ble Court have consistently and rightly held that the observations in *MP Sharma* and the majority judgment in *Kharak Singh* on the right to privacy were not good law.

23. This court has applied the doctrine of implied overruling in a catena of decisions and has held once the decision of the smaller bench has been overruled by a larger bench; the decisions

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[9] **A.K.Gopalan v. State of Madras** (1950) SCR 88.

[10] See ***I.R. Coelho v. State of T.N.***, (2007) 2 SCC 1 #30, 56, 57, 59, 61 & 172; ***M. Nagaraj v. Union of India***, (2006) 8 SCC 212 # 20; ***Selvi v. State of Karnataka***, (2010) 7 SCC 263 # 209, 225; ***Mohd. Arif v. Supreme Court of India***, (2014) 9 SCC 737 # 26

following the decision of the smaller bench will not be considered the good law.[11]

24. In any event, it is submitted the reliance on the observations in *MP Sharma* to hold that the there is no fundamental right to privacy is completely misconceived as the observations of this Court on privacy were made in the context of Article 20(3) and the power of search and seizure. This Court did not examine the extent and contours of Article 21. Further, the said decision was rendered when *A K Gopalan* was the law of land which was premised on the basis of distinctiveness of each of the fundamental rights.

25. The judgment in *Kharak Singh* (per the majority of four judges) relied upon *Gopalan* **(pg 345).** The majority struck down domiciliary visits under clauses (b) of regulation 236 as violative of Article 21. However, Clauses (c), (d), and (e) which dealt with periodic enquiries by officers not below the rank of a sub inspector, reporting by constables and Chowkidars of movement and verification of movement and absences was held to be not covered under Part III. In that context, it was observed that the right to privacy is not a 'guaranteed' right under Constitution.

26. However, the minority view of Justice Subba Rao relying upon the judgment in *Wolf Vs. Colorado [[1949] 238 US 25]*, rightly observed that:

> "...Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. **It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty**. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house where he lives with his family , is his "castle": it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in *Wolf v. Colorado (1949) 338 U.S 25*, pointing out the importance of the security of one's privacy against

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11 See ***C.N. Rudramurthy V K Barkathulla Khan***, 1998 8 SCC 275 # 6; ***Union of India v. Nirala Yadav,*** (2014) 9 SCC 457 #28, 44-46.

> arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. **Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy**. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution". **(page 359)**

27. In ***Gobind v State of Madhya Pradesh***, (1975) 2 SCC 148 (three judges), Justice Mathew in unequivocal terms after noticing *Kharak Singh*, holds that the right to privacy is implicit in the concept of individual autonomy and liberty. However, the Court categorically states that it is not an absolute right and can be subjected to restrictions based on compelling public interest. ***(see para 19 to 31)***. The Court observed that the contours of the right will have to go through a process of case by case developments. In this context para 28 is relevant and reads as follows:

> "28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute."

28. It is relevant to note that *Gobind* was post *R.C. Cooper* and therefore the Court rightly departed from the view in *MP Sharma* and *Kharak Singh* which impliedly stood overruled as far as the observations made on the right to privacy are concerned.

29. This Hon'ble Court in ***Maneka Gandhi Vs UOI***, (1978) 1 SCC 248, clearly and in unequivocal terms held that *Gopalan* stood overruled by *R.C. Cooper*. The minority view in *Kharak Singh* was held to be the correct view. The court in this regard held there can be no doubt that in view of the decision of this Hon'ble Court

in *R.C. Cooper*, the minority view must be regarded as correct and the majority view must be held to have been overruled (***see para 5 of the judgment***).

30. Accordingly, the approval of minority view of Justice Subba Rao in *Kharak Singh* by *Maneka Gandhi* set the matter at rest on the status of the right to privacy as a fundamental right. It is therefore incorrect to contend that the issue as to the status of the right to privacy is *res integra*.

31. This Hon'ble Court has thereafter in almost 24 judgments (two judges and three judges as well as five judges) has consistently held that right to privacy was a facet of personal liberty. In this regard, the following may be seen:

(i) In ***State of Maharashtra v. Madhukar Narayan Mardikar***, (1991) 1 SCC 57, the division bench held as follows:

> "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes." ***(see para 9)***

(ii) In ***R. Rajagopal v. State of T.N.***, (1994) 6 SCC 632, the division bench held as follows:

> "The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. ***(see para 26 (1))***

(iii) In ***People's Union for Civil Liberties (PUCL) v. Union of India***, (1997) 1 SCC 301, the division bench held as follows:

> "It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub rosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day". ***(see para 1)***
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> "We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution." ***(see para 17)***

(iv) In ***Mr 'X' v. Hospital 'Z'***, (1998) 8 SCC 296, the division bench held as follows:

> "Disclosure of even true private facts has the tendency to disturb a person's tranquillity. It may generate many complexes in him and may even lead to psychological problems. He may, thereafter, have a disturbed life all through. In the face of these potentialities, and as already held by this Court in its various decisions referred to above, the right of privacy is an essential component of the right to life envisaged by Article 21. The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others." ***(see para 28)***

(v) In ***Sharda v. Dharmpal***, (2003) 4 SCC 493, a bench of 3 Hon'ble Judges held as follows:

> "With the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21 of the Indian Constitution. (See *R. Rajagopal* v. *State of T.N.* [(1994) 6 SCC 632 : AIR 1995 SC 264] and *People's Union for Civil Liberties* v. *Union of India* [(1997) 1 SCC 301] .) In some cases the right has been held to amalgam of various rights. ***(see para* 56)**

> "But the right to privacy in terms of Article 21 of the Constitution is not an absolute right." ***(see para 57)***

(vi) In ***District Registrar and Collector v. Canara Bank***, (2005) 1 SCC 496, the division bench held as follows:

> "We have referred in detail to the reasons given by Mathew, J. in *Gobind* [(1975) 2 SCC 148 : 1975 SCC (Cri) 468] to show that, the right to privacy has been implied in Articles 19(1)(*a*) and (*d*) and Article 21; that, the right is not absolute and that any State intrusion can be a reasonable restriction only if it has *reasonable basis* or *reasonable materials* to support it." ***(see para* 39)**

> "A two-Judge Bench in *R. Rajagopal* v. *State of T.N.* [(1994) 6 SCC 632] held the right of privacy to be implicit in the right to life and liberty guaranteed to the citizens of India by Article 21. "It is the right to be let alone." Every citizen has a right to safeguard the privacy of his own. However, in the case of a matter being part of public records, including court records, the right of privacy cannot be claimed. The right to privacy has since been widely accepted as implied in our Constitution, in other cases, namely, *People's Union for Civil Liberties* v. *Union of India* [(1997) 1 SCC 301] , *'X'* v. *Hospital 'Z'* [(1998) 8 SCC 296] , *People's*

Union for Civil Liberties v. *Union of India* [(2003) 4 SCC 399] and *Sharda* v. *Dharmpal*[(2003) 4 SCC 493]." ***(see para 40)***

(vii) In ***Directorate of Revenue v. Mohd. Nisar Holia***, (2008) 2 SCC 370, the division bench held as follows:

> "An authority cannot be given an untrammelled power to infringe the right of privacy of any person." ***(see para 14)***

> "A person, if he does not break a law would be entitled to enjoy his life and liberty which would include the right to not to be disturbed. A right to be let alone is recognised to be a right which would fall under Article 21 of the Constitution of India." ***(see para 15)***

(viii) In ***Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat***, (2008) 5 SCC 33, the division bench held as follows:

> "What one eats is one's personal affair and it is a part of his right to privacy which is included in Article 21 of our Constitution as held by several decisions of this Court. In R. Rajagopal v. State of T.N.[(1994) 6 SCC 632 : AIR 1995 SC 264] (vide SCC para 26 : AIR para 28) this Court held that the right to privacy is implicit in the right to life and liberty guaranteed by Article 21. It is a "right to be let alone". ***(see para 27)***

(ix) In ***State of Maharashtra v. Bharat Shanti Lal Shah***, (2008) 13 SCC 5, the division bench held as follows:

> "The right to privacy has been developed by the Supreme Court over a period of time and with the expansive interpretation of the phrase "personal liberty", this right has been read into Article 21. It was stated in *Gobind* v. *State of M.P.* [(1975) 2 SCC 148 : 1975 SCC (Cri) 468] that right to privacy is a "right to be let alone" and a citizen has a right "to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters". The term privacy has not been defined and it was held in *People's Union for Civil Liberties (PUCL)* v. *Union of India* [(1997) 1 SCC 301], that as a concept it may be too broad and moralistic to define it judicially and whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case." ***(see para 57)***

(x) In ***Bhavesh Jayanti Lakhani v. State of Maharashtra***, (2009) 9 SCC 551, the division bench held as follows:

> "Surveillance per se under the provisions of the Act may not violate individual or private rights including the right to privacy. Right to privacy is not enumerated as a fundamental right either in terms of Article 21 of the Constitution of India or otherwise. It, however, by reason of an elaborate interpretation by this Court in Kharak Singh v. State of U.P. [AIR 1963 SC 1295 : (1964) 1 SCR 332] was held to be an essential ingredient of "personal liberty"." ***(see para 102)***

(xi) In ***Bhabani Prasad Jena v. Orissa State Commission for Women***, (2010) 8 SCC 633, the division bench held as follows:

> "In a matter where paternity of a child is in issue before the court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception." ***(see para 21)***

(xii) In ***Selvi v. State of Karnataka***, (2010) 7 SCC 263, a bench of 3 Hon'ble Judges noticed that the minority judgment in Kharak Singh was endorsed by Maneka Gandhi and subsequently followed in Gobind Singh. In para 209 it was held as below:

> "**209**. Following the judicial expansion of the idea of "personal liberty", the status of the "right to privacy" as a component of Article 21 has been recognised and reinforced."held as follows:

(xiii) In ***Amar Singh v. Union of India***, (2011) 7 SCC 69, the division bench held as follows:

> "Considering the materials on record, this Court is of the opinion that it is no doubt true that the service provider has to act on an urgent basis and has to act in public interest. But in a

> given case, like the present one, where the impugned communication dated 9-11-2005 is full of gross mistakes, the service provider while immediately acting upon the same, should simultaneously verify the authenticity of the same from the author of the document. This Court is of the opinion that the service provider has to act as a responsible agency and cannot act on any communication. Sanctity and regularity in official communication in such matters must be maintained especially when the service provider is taking the serious step of intercepting the telephone conversation of a person and by doing so is invading the privacy right of the person concerned and which is a fundamental right protected under the Constitution, as has been held by this Court." ***(see para 39)***

(xiv) In ***Ram Jethmalani v. Union of India***, (2011) 8 SCC 1, the division bench held as follows:

> "Right to privacy is an integral part of right to life. This is a cherished constitutional value, and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner. We understand and appreciate the fact that the situation with respect to unaccounted for monies is extremely grave. Nevertheless, as constitutional adjudicators we always have to be mindful of preserving the sanctity of constitutional values, and hasty steps that derogate from fundamental rights, whether urged by Governments or private citizens, howsoever well meaning they may be, have to be necessarily very carefully scrutinised. The solution for the problem of abrogation of one zone of constitutional values cannot be the creation of another zone of abrogation of constitutional values." ***(see para 83)***

(xv) In ***Hindustan Times v. High Court of Allahabad***, (2011) 13 SCC 155, this Hon'ble Court held that the power of the media to provide the readers and the public in general with information should reconcile with the persons fundamental right to privacy. The division bench held as follows:

> "The unbridled power of the media can become dangerous if checks and balances are not inherent in it. The role of the media is to provide to the readers and the public in general with information and views tested and found as true and correct. This power must be carefully regulated and must reconcile with a person's

fundamental right to privacy. Any wrong or biased information that is put forth can potentially damage the otherwise clean and good reputation of the person or institution against whom something adverse is reported. Pre-judging the issues and rushing to conclusions must be avoided." ***(see para 6)***

(xvi) In ***Ramlila Maidan Incident, In re***, (2012) 5 SCC 1, the division bench held as follows:

> "Right to privacy has been held to be a fundamental right of the citizen being an integral part of Article 21 of the Constitution of India by this Court. Illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under our Constitution. Such a right has been extended even to woman of easy virtues as she has been held to be entitled to her right of privacy. However, right of privacy may not be absolute and in exceptional circumstance particularly surveillance in consonance with the statutory provisions may not violate such a right. [Vide *Malak Singh* v. *State of P&H* [(1981) 1 SCC 420 : 1981 SCC (Cri) 169 : AIR 1981 SC 760] , *State of Maharashtra* v. *Madhukar Narayan Mardikar* [(1991) 1 SCC 57 : 1991 SCC (Cri) 1 : AIR 1991 SC 207] , *R. Rajagopal* v. *State of T.N.* [(1994) 6 SCC 632 : AIR 1995 SC 264] , *People's Union for Civil Liberties* v. *Union of India* [(1997) 1 SCC 301 : AIR 1997 SC 568] , *Mr 'X'* v. *Hospital 'Z'*[(1998) 8 SCC 296] , *Sharda* v. *Dharmpal* [(2003) 4 SCC 493] , *People's Union for Civil Liberties* v. *Union of India* [(2003) 4 SCC 399 : AIR 2003 SC 2363] , *District Registrar and Collector* v. *Canara Bank* [(2005) 1 SCC 496] , *Bhavesh Jayanti Lakhani* v. *State of Maharashtra* [(2009) 9 SCC 551 : (2010) 1 SCC (Cri) 47] and *Selvi* v. *State of Karnataka* [(2010) 7 SCC 263 : (2010) 3 SCC (Cri) 1 : AIR 2010 SC 1974] .]" ***(see para 312)***

(xvii) In ***Sahara India Real Estate Corpn. Ltd. v. SEBI***, (2012) 10 SCC 603, the Constitution Bench of this Hon'ble Court approved the minority judgment of Justice Subba Rao in para 24 and relying upon Blackstone's Commentaries on the laws of England observed in para 26 as follows:

> "Personal liberty" includes "the power to locomotion of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law." In A.K. Gopalan case [AIR 1950 SC 27] , it is described to mean liberty relating to or concerning the

person or body of the individual; and personal liberty in this sense is the antithesis of physical restraint or coercion. The expression is wide enough to take in a night to be free from restrictions placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. In an uncivilised society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilisation advances the psychological restraints are more, effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected groves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security.

...If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under, Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution.

...namely, whether the petitioner's fundamental right under Article 19(1)(d) is also infringed. What is the content of the said fundamental right? It is argued for the State that it means only that a person can move physically from one point to another without any restraint.' This argument ignores the adverb "freely" in clause (d). If that adverb is not in the clause, there may be some justification for this contention; but the adverb "freely" gives a larger content to the freedom mere movement

unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automation. How could a movement under the scrutinising gaze of the policemen be described as a free movement? The whole country is his jail. The freedom of movement in clause (d) therefore must be a movement in a free country i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do." ***(see para 26)***

(xviii) In ***Bihar Public Service Commission v. Saiyed Hussain Abbas Rizwi***, (2012) 13 SCC 61, the division bench held as follows:

"Another right of a citizen protected under the Constitution is the right to *privacy*. This right is enshrined within the spirit of Article 21 of the Constitution. Thus, the right to information has to be balanced with the right to privacy within the framework of law." ***(see para 10)***

"The information may come to knowledge of the authority as a result of disclosure by others who give that information in confidence and with complete faith, integrity and fidelity. Secrecy of such information shall be maintained, thus, bringing it within the ambit of fiduciary capacity. Similarly, there may be cases where the disclosure has no relationship to any public activity or interest or it may even cause unwarranted invasion of privacy of the individual. All these protections have to be given their due implementation as they spring from statutory exemptions. It is not a decision simpliciter between private interest and public interest. It is a matter where a constitutional protection is available to a person with regard to the right to privacy. Thus, the public interest has to be construed while keeping in mind the

balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these rights emerge from the constitutional values under the Constitution of India." ***(see para 23)***

(xix) In ***Thalappalam Service Coop. Bank Ltd. v. State of Kerala***, (2013) 16 SCC 82, a division bench of this Hon'ble Court held that the right to privacy was not an absolute right and can be regulated, restricted and curtailed in larger public interest. In this regard it was held as follows:

"The right to privacy is also not expressly guaranteed under the Constitution of India. However, the Privacy Bill, 2011 to provide for the right to privacy to citizens of India and to regulate the collection, maintenance and dissemination of their personal information and for penalisation for violation of such rights and matters connected therewith, is pending. In several judgments including *Kharak Singh* v. *State of U.P.*[AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] , *R. Rajagopal* v. *State of T.N.* [(1994) 6 SCC 632] , *People's Union for Civil Liberties* v. *Union of India* [(1997) 1 SCC 301] and *State of Maharashtra* v. *Bharat Shanti Lal Shah* [(2008) 13 SCC 5] this Court has recognised the right to privacy as a fundamental right emanating from Article 21 of the Constitution of India." ***(see para 57)***

"The right to information and right to privacy are, therefore, not absolute rights, both the rights, one of which falls under Article 19(1)(*a*) and the other under Article 21 of the Constitution of India, can obviously be regulated, restricted and curtailed in the larger public interest. Absolute or uncontrolled individual rights do not and cannot exist in any modern State. Citizens' right to get information is statutorily recognised by the RTI Act, but at the same time limitations are also provided in the Act itself, which is discernible from the Preamble and other provisions of the Act. First of all, the scope and ambit of the expression "public authority" has been restricted by a statutory definition under Section 2(*h*) limiting it to the categories mentioned therein which exhaust itself, unless the context otherwise requires. Citizens, as already indicated by us, have a right to get information, but can have access only to the information "held" and under the "control of public authorities", with limitations. If the information is not statutorily

> accessible by a public authority, as defined in Section 2(*h*) of the Act, evidently, those information will not be under the "control of the public authority". Resultantly, it will not be possible for the citizens to secure access to those information which are not under the control of the public authority. The citizens, in that event, can always claim a right to privacy, the right of a citizen to access information should be respected, so also a citizen's right to privacy." ***(see para 61)***

(xx) In ***National Legal Services Authority v. Union of India***, (2014) 5 SCC 438, a division bench of this Hon'ble Court while upholding the fundamental rights of the transgender community held as follows:

> "Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(*a*) of the Constitution of India. A transgender's personality could be expressed by the transgender's behaviour and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(*a*) of the Constitution of India and the State is bound to protect and recognise those rights." ***(see para 72)***

(xxi) In ***Manoj Narula v. Union of India***, (2014) 9 SCC 1, a Constitution Bench in para 69 held that Article 21 has many facets and relying upon *R. Rajgopal* it was held that the right to privacy is inferred from Article 21. In this regard it was observed that:

> "In this regard, inclusion of many a facet within the ambit of Article 21 is well established. In R. Rajagopal v. State of T.N. [(1994) 6 SCC 632] , right to privacy has been inferred from Article 21. Similarly, in Joginder Kumar v. State of U.P. [(1994) 4 SCC 260 : 1994 SCC (Cri) 1172 : AIR 1994 SC 1349] , inherent rights under Articles 21 and 22 have been stated. Likewise, while dealing with freedom of speech and expression and freedom of press, the Court, in Romesh Thappar v. State of Madras [AIR 1950

SC 124 : (1950) 51 Cri LJ 1514] , has observed that freedom of speech and expression includes freedom of propagation of ideas." ***(See para 69)***

(xxii) In ***ABC v. State (NCT of Delhi)***, (2015) 10 SCC 1, the division bench held as follows:

> "It is imperative that the rights of the mother must also be given due consideration. As Ms Malhotra, learned Senior Counsel for the appellant, has eloquently argued, the appellant's fundamental right of privacy would be violated if she is forced to disclose the name and particulars of the father of her child." ***(see para 20)***

(xxiii) This Hon'ble Court in ***Supreme Court Advocates-on-Record Assn. v. Union of India***, (2016) 5 SCC 1 (J. Lokur), held that the 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. In this regard, the Constitution Bench held as follows:

> "The balance between transparency and confidentiality is very delicate and if some sensitive information about a particular person is made public, it can have a far-reaching impact on his/her reputation and dignity. The 99th Constitution Amendment Act and the NJAC Act have not taken note of the privacy concerns of an individual. This is important because it was submitted by the learned Attorney General that the proceedings of NJAC will be completely transparent and any one can have access to information that is available with NJAC. This is a rather sweeping generalisation which obviously does not take into account the privacy of a person who has been recommended for appointment, particularly as a Judge of the High Court or in the first instance as a Judge of the Supreme Court. The right to know is not a fundamental right but at best it is an implicit fundamental right and it is hedged in with the implicit fundamental right to privacy that all people enjoy. The balance between the two implied fundamental rights is difficult to maintain, but the 99th Constitution Amendment Act and the NJAC Act do not even attempt to consider, let alone achieve that balance." ***(see para 953)***

(xxiv) In ***Asha Ranjan v. State of Bihar***, (2017) 4 SCC 397, the division bench held as follows:

> "In this context, it is also appropriate to refer to certain other decisions where the Court has dealt with the concept of competing rights. We are disposed to think that dictum laid therein has to be appositely appreciated. In *'X'* v. *Hospital 'Z'* [*'X'* v. *Hospital 'Z'*, (1998) 8 SCC 296] , the issue arose with regard to right to privacy as implicit in the right to life and liberty as guaranteed to the citizens under Article 21 of the Constitution and the right of another to lead a healthy life. Dealing with the said controversy, the Court held that as a human being, Ms 'Y' must also enjoy, as she obviously is entitled to all the human rights available to any other human being. This is apart from, and in addition to, the fundamental right available to her under Article 21, which guarantees "right to life" to every citizen of this country. The Court further held that where there is a clash of two fundamental rights, namely, the appellant's right to privacy as part of right to life and Ms Y's right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as the courtroom, but have to be sensitive." ***(see para 56)***

32. Thus, the status of the right to privacy as a fundamental right has been settled by a catena of judgments, not only of two and three judges, but also by Constitution Benches as well. Thus *A.K. Gopalan* being held as bad law by an 11 judge bench in *R.C. Cooper*, the foundation and the basis of *M.P. Sharma* and *Kharak Singh*, which were premised on Gopalan, by necessary implication could not be good law and therefore the subsequent benches have rightly disregarded the same and held that the right to privacy is a fundamental right emanating from Art. 21.

33. In view of the above it is submitted that these judgments which have rightly held the field should not be unsettled as Lord Coke aptly described that *"those things which have been so often adjudged ought to rest in peace"*[12].

34. Even otherwise, as pointed out herein above, the right to privacy has to be delineated and understood in the context of the current

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[12] *Shankar Raju v. Union of India,* (2011) 2 SCC 132 (see para 10)

advances made by society in the field of technology and communications and not merely from the paradigm of issues of search and seizure arising in *M.P. Sharma* or personal surveillance issues in *Kharak Singh*.

DRAWN BY:

DEVADATT KAMAT,
AAG FOR STATE OF KARNATAKA

SETTLED BY:

KAPIL SIBAL,
SENIOR ADVOCATE

FILED BY:

JOSEPH ARISTOTLE